

The “Shadow Docket”: The Supreme Court’s Non-Merits Orders

August 26, 2021

The evening of Friday, August 20, 2021, saw significant activity on the Supreme Court’s non-merits docket. That evening, the Biden Administration filed an application for stay pending appeal in *Biden v. Texas*, seeking to pause a Texas district court order blocking the rescission of a Trump Administration immigration policy known as the “Migrant Protection Protocols” (MPP). After 11 p.m. that evening, Justice Alito issued a [temporary administrative stay](#) of the Texas court’s decision, pausing the order requiring enforcement of the MPP until the full Court could consider whether a longer stay was warranted. The full Court [denied the application for stay](#) several days later. Also on the evening of August 20, in *Alabama Association of Realtors v. Department of Health and Human Services*, a group of landlords and real estate trade associations challenging the Centers for Disease Control and Prevention (CDC) [eviction moratorium](#) filed an emergency application for a Supreme Court order that would immediately bar enforcement of the moratorium. Shortly after the application was docketed in *Alabama Association of Realtors*, Chief Justice Roberts ordered the government to file a response by noon on Monday, August 23, 2021; the Court did not otherwise immediately act on the application. Both cases [received significant news coverage](#), even before the full Court ruled in either matter.

The Supreme Court’s non-merits or motions docket, sometimes informally called the Court’s “shadow docket,” has recently attracted attention from [legislators](#), [legal commentators](#), and the [popular press](#). While the Supreme Court’s motions docket has existed [almost as long as the Court itself](#), many observers believe that in recent years the Court has [increasingly](#) disposed of high-profile matters via non-merits rulings, and some have raised legal questions and concerns about that trend. This Legal Sidebar provides an overview of the Supreme Court’s non-merits docket and discusses selected related considerations for Congress.

Supreme Court Motions Practice and the Non-Merits Docket

Discussion of Supreme Court cases often focuses on the Court’s merits decisions—opinions that the Court issues after full briefing and oral argument. However, the Supreme Court also issues many [orders outside the context of merits decisions](#), including orders granting or denying petitions for a writ of certiorari; rulings in emergency matters, such as requests to stay lower court decisions pending appeal; and orders setting deadlines and other procedures for litigation before the Court. Most decisions on the

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Court's non-merits docket involve either granting or denying certiorari or routine procedural questions, but some of the Court's non-merits orders in emergency matters have a major impact on high-profile litigation. Emergency litigation before the Supreme Court often concerns requests for preliminary injunctive relief. In theory, such relief is designed to [preserve the status quo](#) while a case is pending and remains in effect only until the courts can fully consider the merits of the case. However, emergency matters are often subject to rigid real-world deadlines, and sometimes the federal courts are not able to consider the merits in full before those deadlines pass. In those cases, a decision to grant or deny a preliminary injunction (or a stay of a preliminary injunction issued by a lower court) may [effectively resolve the case](#).

The Supreme Court's procedures in non-merits matters differ significantly from its procedures in merits cases. In merits cases, the Court typically considers [briefs](#) and [oral argument](#) from the parties. In addition, the Court often receives input from non-parties known as *amici curiae*, who raise additional issues and arguments potentially relevant to the case. For [non-merits matters](#), the Court generally does not hear oral argument and receives limited input from non-parties. Briefs from the parties are generally shorter than merits briefs, may be prepared on a very tight timeline, and may be based on a limited factual record; in some cases, the Court does not wait for a full briefing before issuing an order.

The Supreme Court's decisions generally take different forms in merits cases and in non-merits matters. When issuing a [merits decision](#), the Court usually publishes a written opinion that explains the Court's reasoning and notes which Justice authored the opinion and which Justices joined it. Justices may also file separate opinions concurring or dissenting in full or in part; those [separate opinions](#) are also signed by their authors and any other Justices who joined them. By contrast, the Court frequently decides non-merits matters using [summary orders](#). While those orders sometimes include a brief explanation of the legal reasoning underlying the decision, they often lack [legal analysis](#). Nor do summary orders typically reveal [how the Justices voted](#). As with merits decisions, Justices may concur in or dissent from non-merits decisions, and may elect to file separate statements explaining their position.

Recent Trends on the Court's Non-Merits Docket

Commentators generally agree that, in recent years, the Court has issued [more orders](#) on its non-merits docket that concern high-profile litigation relating to issues of public interest, and they offer several possible reasons for the change. Some point to the [litigation strategy of parties](#), and particularly the federal government, noting that the Justice Department under the Trump Administration sought emergency relief from the Supreme Court [far more often than prior administrations](#). It remains to be seen whether that practice will continue under the Biden Administration: at the time of writing, the Biden Administration has sought emergency relief from the Supreme Court [once](#), in *Biden v. Texas*.

Some observers trace the increase in high-profile non-merits rulings to changes in the Court itself, citing possible [changes in how the Justices apply the legal test](#) for emergency relief. One scholar contends that use of the non-merits docket is driven in significant part by lower courts' issuance of [nationwide injunctions](#)—court orders that bar a party (often the federal government) from taking a certain action not only against other parties to the litigation, but also against anybody else. Nationwide injunctions have garnered [considerable attention](#) in recent years, and two members of the Court have authored [separate opinions](#) disapproving of such orders, so it is possible that some of the Court's non-merits decisions seek to curb the practice. [Another scholar notes](#) that appeals involving nationwide injunctions comprise “only one modest slice of the shadow docket” and thus do not fully explain the increase in high-profile non-merits decisions.

During its October 2020 term, the Supreme Court has issued non-merits orders in high-profile cases involving the 2020 U.S. Census, the 2020 presidential election, the death penalty, immigration law, and

government policies intended to prevent the spread of COVID-19. The following subsections outline selected recent cases in each of those areas.

Census Litigation

In April 2020, the U.S. Census Bureau [extended certain deadlines](#), including the schedule for collecting 2020 Census data, in response to the COVID-19 pandemic. Then, in August 2020, the Bureau announced a [revised plan](#) that reduced the extended timeframe for data collection by half, so that collection would end on September 30. Several individuals and organizations sued, arguing that the abbreviated collection period would yield inaccurate results, and sought an injunction preventing the government from implementing the revised deadlines. The district court granted the injunction, and the Ninth Circuit declined to stay the district court's decision as to the data collection deadline. On October 13, 2020, the [Supreme Court](#) stayed the district court's decision in its entirety. The stay order effectively allowed Census data collection to [cease almost immediately](#).

Election Litigation

Because Election Day imposes a rigid deadline for resolving disputes related to voting procedures, election cases [often proceed on an expedited basis](#) and arrive on the Court's emergency docket. During the 2020 election season, the COVID-19 pandemic spurred additional election-related litigation as election officials and courts considered various measures designed to ensure voters could cast their ballots safely. (Non-merits litigation related to the 2020 election also reached the Court [during the 2019 term](#).) Non-merits election cases from the Court's 2020 term included:

- *Andino v. Middleton*, in which the Court partially stayed a district court's preliminary injunction, thus allowing South Carolina to enforce a requirement that another individual witness a voter's signature on an absentee ballot envelope;
- *Merrill v. People First of Alabama*, in which the Court stayed a district court injunction, thus preventing Alabama counties from implementing curbside voting for voters with disabilities during the COVID-19 pandemic; and
- *Republican Party of Pennsylvania v. Boockvar*, in which the Court declined to stay a [state supreme court order](#) permitting mail-in votes that were mailed on or before Election Day to be counted as long as they were received by November 6.

Death Penalty Litigation

Like election cases, parties often litigate [death penalty cases](#) on an emergency basis, and such cases have long featured prominently on the Court's non-merits docket. This may be because prisoners [raise new claims](#) at the last minute seeking to avoid execution, because prisoners have [longstanding legal challenges](#) pending in state or federal court that gain new urgency once an execution is scheduled, or because some challenges to a death sentence cannot be brought until an execution date is set, often just weeks in advance. One case of note from the 2020 term is *Dunn v. Smith*. In *Smith*, a death row inmate challenged on free exercise grounds the State of Alabama's refusal to allow his spiritual adviser into the execution chamber during his execution. After the Eleventh Circuit entered an injunction blocking the execution unless the inmate could have his pastor with him, the Supreme Court rejected the State's request to vacate the injunction and allow the execution to proceed as planned.

Some observers have asserted that the Court's decision in *Smith* is [difficult to reconcile](#) with previous orders from the Court's non-merits docket involving free exercise claims from condemned individuals. While there were differences between those cases that might explain the varying outcomes, disposition of

the cases through summary orders means that lower courts and the public [do not have comprehensive legal analysis from the Court](#) to help draw distinctions between them.

Immigration Litigation

The Supreme Court has recently considered multiple [non-merits matters involving immigration policy](#), including the MPP. Originally announced in 2018 and also known as the “Remain in Mexico” policy, the MPP allowed Customs and Border Protection to require many non-U.S. nationals who arrived at the southern border seeking asylum or related protections to wait in Mexico while U.S. immigration courts processed their cases. Litigation related to the MPP previously reached the Supreme Court during the Court’s 2019 term. As outlined in an [earlier Legal Sidebar](#), a California district court issued a preliminary injunction setting aside the MPP on the grounds that the plaintiffs had shown a likelihood of success on their claims, and the Ninth Circuit ultimately affirmed in February 2020 and issued an order that would have blocked the MPP in California and Arizona. However, on March 11, 2020, the Supreme Court granted the government a stay of the preliminary injunction, preventing the Ninth Circuit order from taking effect and allowing the MPP to continue while litigation on the merits remained pending.

After President Biden took office, the Secretary of Homeland Security [decided to terminate the MPP](#). That decision was challenged in court, and on August 13, 2021, the [district court](#) vacated the Secretary’s decision and issued a nationwide injunction requiring DHS “to enforce and implement [the] MPP *in good faith*” (emphasis in original). The district court and the Fifth Circuit both declined to stay that ruling pending appeal. The Biden Administration then filed its request for emergency relief from the Supreme Court in *Biden v. Texas*. On the evening of August 24, 2021, the full Supreme Court issued a [summary order](#) denying the application for stay because the government “failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious.” The Administration is now required to implement the MPP, though it retains [substantial discretion](#) over how to administer the MPP and other authorities for processing migrants at the border.

COVID-19 Policies

[Multiple cases](#) involving measures intended to prevent the spread of COVID-19 appeared on the Supreme Court’s non-merits docket during the 2019 and 2020 terms, including two cases involving California policies. The first case, *South Bay United Pentecostal Church v. Newsom*, involved a challenge to statewide COVID-19 restrictions that prohibited indoor worship. In a summary order accompanied by several separate opinions, the Supreme Court enjoined the state from enforcing the indoor worship provision, but declined to block a separate capacity limitation and a prohibition on singing and chanting. Several weeks later, in *Gateway City Church v. Newsom*, the Court considered a county regulation that prohibited indoor worship services during the coronavirus pandemic. The Court enjoined application of the regulation, issuing a brief summary order that stated in part, “The Ninth Circuit’s failure to grant relief was erroneous. This outcome is clearly dictated by this Court’s decision in *South Bay United Pentecostal Church v. Newsom*.”

More recently, the Supreme Court has issued non-merits orders related to challenges to the CDC’s federal eviction moratorium. As outlined in a [previous Legal Sidebar](#), in June 2021, the Court denied a motion to vacate a stay, effectively allowing the eviction moratorium to remain in effect until it expired on August 1, 2021. The CDC subsequently [extended the moratorium](#) until October 3, 2021, in counties experiencing substantial and high levels of COVID-19 transmission. Now, in *Alabama Association of Realtors*, the Court is considering an application to vacate a stay pending appeal, seeking a Supreme Court order that would immediately bar enforcement of the moratorium.

Considerations for Congress

As noted above, the vast majority of orders on the Supreme Court's non-merits docket concern routine procedural matters; those routine procedural orders are generally uncontroversial. On the other hand, some commentators have raised legal questions and concerns about high-profile non-merits orders such as those outlined in the previous section.

One key legal question concerns the precedential effect of the Supreme Court's non-merits orders. Merits decisions issued by a majority of the Supreme Court carry precedential weight, meaning that they dictate the outcome of future cases that raise the same issues. Non-merits orders and other preliminary orders, in contrast, have traditionally not been treated as binding on the lower courts. Recently, the Court's use of its prior non-merits orders has increased [uncertainty](#) over the precedential value of non-merits orders beyond the case in which they are issued. In its order in *Gateway City Church*, discussed above, the Court wrote that the lower court's "failure to grant relief was erroneous," because the right to injunctive relief was "clearly dictated" by the Court's prior summary order in *South Bay United Pentecostal Church*. However, if the Court cites its own non-merits orders as a basis for finding lower court decisions "erroneous," that raises the question of how lower courts and others should [interpret and apply those orders](#). Even if the Court's non-merits decisions are not directly binding in a particular case, observers may look to the Court's summary orders in an attempt to divine how the Court might rule in similar cases. The disposition of high-profile matters through summary orders may create challenges for lower courts and policymakers as they seek to determine the legal standards to apply, particularly when the orders do not include a substantive majority opinion.

Some commentators take issue with the Court's procedures for handling important matters through non-merits decisions. They note that because many non-merits matters are litigated on an emergency basis in the trial court and on appeal, the factual and legal record [may not be fully developed](#). Appellate courts often grant or deny stays with [little or no explanation](#), making it difficult for observers to tell whether courts are applying the legal tests for emergency relief consistently. Such deficiencies may be [exacerbated](#) once cases reach the Supreme Court, where emergency matters generally involve limited briefing by the parties, no oral argument, and limited opportunity for participation by amici. Moreover, when these appeals arise from orders issued very early in the litigation process, the Court may [unnecessarily reach issues](#) that would have become moot or otherwise dropped out of the litigation had it proceeded on a non-expedited basis. Some also argue that the expedited timeline of emergency litigation allows the Court [less time to consider the issues](#), reach a well-reasoned decision, and seek compromise when appropriate.

Some of the foregoing concerns apply to all emergency litigation, but others are unique to the Supreme Court's non-merits docket. For instance, some commentators assert that the Supreme Court has become too willing to [overrule lower courts by summary order](#) in cases where the lower courts had more opportunity to consider the issues presented. Some note that it is [unclear how the Court selects](#) discretionary matters that appear on the non-merits docket, such as summary reversals. Others contend that the Court's non-merits decisions [lack transparency](#) because those decisions do not always indicate which Justices voted for or against the disposition. The lack of recorded votes may reduce accountability for the individual Justices and remove an incentive for them to ensure that their votes are consistent over time. Moreover, the lack of published legal reasoning from the majority in many non-merits cases may "make[] it [impossible to scrutinize](#) the merits of the Court's action" or to determine whether the Court as a whole remains [consistent across cases](#). Those procedural concerns may, in turn, give rise to broader concerns about judicial legitimacy. Some commentators note that it may [undermine public confidence](#) in the judiciary when the Supreme Court sets aside a lower court decision containing extensive legal analysis through a brief summary order. Another scholar downplays many of the concerns around the Supreme Court's non-merits decisions, [asserting](#) that "the orders list and the procedures governing it reflect how the Supreme Court conducts most of its business."

Scholars and legislators have advanced numerous recent proposals that could address the Supreme Court's issuance of consequential decisions through summary orders. Some commentators assert that it would be [most appropriate](#) for the Court itself to [address the issue](#), which would accord deference to the courts on how to manage their dockets and avoid any possible constitutional issues related to the separation of powers. To the extent the rise of the “shadow docket” stems from the federal government's litigation strategy, the [Executive Branch](#) could also play a role in reform. However, some argue that [Congress also has authority to act in this area](#), and Congress has explored the issue, including through a February 2021 [hearing on the “shadow docket”](#) in the House Subcommittee on Courts, Intellectual Property, and the Internet.

Judicial procedures are generally based on [court-created rules](#) rather than constitutional mandates, and Congress can alter those procedures through legislation. For example, Congress could enact [legislation](#) intended to [limit nationwide injunctions](#), potentially reducing the need for the Supreme Court to review far-reaching lower court orders on an expedited basis. Congress could also allow transfer of cases seeking nationwide injunctions to the federal courts in the District of Columbia to mitigate forum-shopping concerns, or speed up the appeals process for cases involving injunctions against government action, in order to “[tak\[e\] pressure off of the shadow docket.](#)”

Congress might also consider reforms targeting specific types of cases, such as establishing [procedures for death penalty litigation](#) that might forestall some emergency litigation or [establish standards for the Court to apply](#). [Another proposal](#) would limit the use of summary orders in certain voting rights litigation by requiring any court vacating or staying an order of injunctive relief to make specific findings with respect to the public interest and provide a written explanation for its ruling. More generally, commentators have suggested that Congress could [codify the legal test for emergency relief](#).

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